Docket: 2002-2996(EI)

BETWEEN:

MCQUEEN AGENCIES LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeal of *McQueen Agencies Limited* (2002-2997(CPP)) on March 12, 2003 at Saskatoon, Saskatchewan,

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Catherine Sloan Violet Paradis (Articling Student)
Counsel for the Respondent:	Lyle Bouvier

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 3rd day of July 2003.

"D.W. Rowe"

Rowe, D.J.

Citation: 2003TCC430
Date: 20030703
Dockets : 2002-2996(EI)
2002-2997(CPP)

BETWEEN:

MCQUEEN AGENCIES LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant appeals from two decisions issued by the Minister of National Revenue (the "Minister") – both dated April 23, 2002 – wherein the Minister decided Ben Buchinski (the "worker") was engaged in both insurable and pensionable employment with McQueen Agencies Limited (MAL or payor) during the period from July 22, 2001 to August 30, 2001 because he was employed under a contract of service pursuant to the relevant provisions of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), respectively.

[2] Counsel agreed both appeals could be heard together.

[3] John Rennie McQueen testified he is President of MAL, a corporation selling hail insurance in Saskatchewan, Alberta and Manitoba. MAL, operating out of Saskatoon, Saskatchewan is a General Agent for Palliser Insurance Corporation, an insurer. McQueen stated he began working as a life insurance agent during the summer of 1958 and – in 1960 – began working for MAL - his father's business – and assumed the position of President following the death of his father. McQueen stated the process of administering a claim for crop loss commences when a farmer contacts MAL and reports damage. As a result, MAL

management refers to a list with the names of between 65 and 80 adjusters - located throughout the Prairie Provinces - and assigns an adjuster to determine the extent of the loss. Attempts are made to hire adjusters in a particular area where the loss occurred. The number of claims and the amount of acres involved determines how many adjusters are needed and extensive damage from a severe hailstorm may require the services of 8 or 9 adjusters to handle a large number of claims. McQueen was referred to a binder of documents tabbed 1-15, inclusive, filed as Exhibit A-1 (reference to a tab number will indicate the document(s) are within said Exhibit). After the examination of the crop loss has taken place, a Hail Adjustment Proof of Loss form – tab 7 - is prepared and signed by both the farmer and the adjuster. Thereafter, the form is submitted to MAL for approval and payment. McQueen stated most of the adjusting work is performed in July, August and September, and during that period an adjuster would accept assignments and decide the most efficient method of attending at a site in order to adjust the loss and process the requisite paperwork. On some occasions, an adjuster may work up to 14 hours per day but other times may be finished after a few hours. MAL paid all expenses – such as lodging, meals, per-kilometre compensation for use of private vehicles - directly related to performance of the work. McQueen stated MAL will attempt – first - to contact an experienced adjuster who has worked previously for the agency. Sometimes, an adjuster will hire another person to assist with the paperwork but all adjusting services must be performed personally by the designated adjuster. Ben Buchinski worked as an adjuster from July 22 to August 30, 2001. McQueen stated Buchinski – in late 2000 or early 2001 – visited the MAL office and indicated he wanted to become an adjuster. Discussions were held during which McQueen advised him not to quit his regular employment because adjusting work was performed only during the summer months. McQueen informed Buchinski about the Adjusters' Conference held each year in July and suggested he attend in order to learn about the business. In addition, McQueen advised Buchinski that if he decided to become an adjuster, he would be accompanied by a senior adjuster in order to learn proper procedures in accordance with a manual used within the crop insurance industry. McQueen stated he offered to pay Buchinski the sum of $75 per day during this training period. McQueen stated that although no written contract was entered into between MAL and Buchinski, the worker had agreed to the terms discussed between themselves earlier. Buchinski began working on the basis he would be trained by experienced adjusters until they were able to conclude – and subsequently advise McQueen - that he was able to function adequately without supervision. From time to time, McQueen would telephone Buchinski to advise him of a particular location where experienced adjusters were handling a claim. McQueen stated that on one occasion Buchinski informed the MAL office he

would not attend at a particular farm because he had to travel to Calgary for personal reasons. McQueen stated he accepted this pronouncement on the practical basis that "you can't get mad at adjusters because you have to rely on them". Buchinski received a manual and the only other tools and equipment required were a motor vehicle, proper clothing and boots. The worker submitted numerous Adjusters Weekly Expense sheets – tab 6 – and MAL issued payment based on those expenditures together with the total amount of fees earned from adjusting at various farms on certain days - or half-days – based on the per diem rate of $75. No other benefits or remuneration was paid to the worker. McQueen stated his opinion that a flat rate per day would not be attractive to an adjuster if required to travel a substantial distance in order to attend at the site of a reported loss. Usually, adjusters included in the MAL list have previous experience but sometimes there is a need to contact other insurance agencies in order to obtain the services of an adjuster on their list. When this occurs, the adjuster will either be paid directly by MAL or by the other agency which will then invoice MAL for his services. McQueen stated that in the event he did not approve a loss - as calculated by one of the adjusters - he would attend personally at the farm or hire another adjuster to provide a second opinion. In circumstances where a farmer and the insurer are not able to agree on the amount of loss, there is a procedure enumerated as a statutory condition of the insurance policy that provides for a mechanism to resolve the dispute. Otherwise, losses are usually paid within two weeks or at some point well within the required time limit of 60 days. McQueen stated no adjuster had ever been fired by MAL. As a matter of business practice, if MAL is not satisfied with an individual's work, that person will no longer be contacted and offered adjusting assignments. McQueen referred to an extract - Exhibit A-2 - from *The Saskatchewan Insurance Act, chapter S-26, 1978,* wherein pursuant to section 15, a procedure for appraisal in case of disagreement provides for certain steps to be followed. On occasion, there has been a dispute between a particular farmer/policyholder and an insurance company (other than Palliser Insurance) and the farmer has telephoned MAL in order to be provided with some names of adjusters in order to retain one of them for the purpose of providing an appraisal of damage in the course of pursuing resolution of the claim. McQueen stated the intention throughout the relevant period was that Buchinski would be an independent contractor and – at some point in their discussions – had advised Buchinski that he would be performing services on the basis he was in business for himself. By letter dated September 20, 2001 – tab 1 – Human Resources Development Canada (HRDC) requested MAL to provide a Record of Employment - for Buchinski - for the relevant period and by letter – tab 2 – dated the same day – informed MAL that it had determined the worker was employed under a contract of service pursuant to provisions of the *Act.* On October 31, 2001,

an appeal – tab 3 – was made to the Minister and in the process a Questionnaire – tab 4 – was completed by McQueen on behalf of the appellant corporation. On April 23, 2002, by letter - tab 5 – the Minister upheld the previous ruling.

[4] In cross-examination, John McQueen stated the procedure followed by MAL was to have the assigned adjuster contact the farmer to advise that he had been assigned to handle the claim. He stated MAL paid Buchinski the fixed daily rate of $75 to attend the adjusters' conference together with related expenses. Buchinski – probably – did not adjust for any other companies since he was in training throughout the entire relevant period. McQueen explained that MAL is a family-run business involving two brother and two sons, one of whom – like McQueen – is an adjuster. Palliser Insurance Corporation is the underwriter and there is an extensive amount of work that has to be done by MAL throughout the entire year. The going rate of remuneration within the hail crop insurance industry for fully-fledged adjusters ranged to a maximum of $160 per day depending on skill level and experience in adjusting damage to crops during various stages of growth. McQueen stated that due to the nature of the work and the short season, many adjusters are retired policemen, teachers or other persons who are engaged in other business activity or employment.

[5] Counsel for the appellant and counsel for the respondent in the within appeals were counsel in the appeals of *Wray Agencies Limited. v. M.N.R.* - 2002-2994(EI) and 2002-2995(CPP) - heard the same day, albeit separately. For convenience, counsel combined their submissions on the *Wray* matter and the within appeals with respect to the relevant jurisprudence.

[6] Counsel for the appellant submitted the evidence established the worker and the payor agreed to have a working relationship wherein Buchinski's services would be provided on the basis he was an independent contractor. Due to the nature of the work being undertaken, there was not much required in the form of tools and equipment except a motor vehicle, proper clothing and footwear. Direct work-related expenses were reimbursed by MAL and the worker was free to decide whether to accept adjusting assignments during which he was always accompanied by a senior adjuster. The hours were flexible and Buchinski agreed to provide his services at a fixed, daily fee.

[7] Counsel for the respondent that Buchinski – unlike Skene, the worker in the *Wray* case - had not had any previous adjusting experience and was in training - under the supervision of various senior adjusters - throughout the entire period. In addition, the worker reported to the appellant's premises from time to time and

accompanied experienced adjusters in an effort to become proficient in that particular skill.

[8] The Supreme Court of Canada - in a recent decision - *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 - (*Sagaz*) - dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 45 to 48, inclusive, of his judgment stated:

> Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" (1987), 37 U.T.L.J. 25, at p. 29) sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in London Drugs where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents".
>
> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, ... ([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416) Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, ...(Vicarious Liability in the Law of Torts. London:

Butterworths, 1967) at p. 38, that what must always occur is a search for the total relationship of the parties:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[9] I will examine the facts in relation to the indicia set forth in the judgment of Major, J. in *Sagaz.*

Level of control:

[10] In my view, there is a significant difference between the circumstances of the working relationship between MAL and Buchinski and the worker – Skene -

and the payor – Agencies - in the *Wray* case. In *Wray*, Skene came to Agencies as an experienced adjuster - currently engaged with another company – and advised he wanted to secure additional adjusting work. Apart from a brief training period – mainly for the purpose of demonstrating his ability in the field and his understanding of the relevant paperwork -Skene was able to operate on his own without any need for supervision. In the within appeals, MAL exercised control – albeit, in a somewhat unusual manner - in that its other adjusters (assumed for the sake of argument to have been independent contractors) agreed to undertake a supervisory role over the activities of Buchinski who had contacted McQueen and expressed a desire to become an adjuster. In his testimony, McQueen stated it was these senior adjusters who were willing to - in effect – provide MAL with an informal certification in due course – if and when – Buchinski became qualified to carry out crop adjusting duties on his own. That endorsement did not occur during the relevant period. The worker also reported to the MAL premises from time to time.

Provision of equipment and/or helpers

[11] Buchinski was in no position to retain the services of helpers. He was not able to perform the actual adjusting service personally but assisted other adjusters assigned to those tasks from time to time. He was required to provide a motor vehicle and proper working attire.

Degree of financial risk and responsibility for investment and management

[12] The worker was paid the sum of $75 per day. He was not expected to exercise any management function and could not even manage his own schedule in the fullest sense because each time he attended at a farm for the purpose of examining the extent of crop loss, he was required to work under the direct supervision of a senior adjuster. Buchinski would receive a telephone call from the MAL office to advise him where senior adjusters were working and could choose whether to attend those locations in order to participate in the adjusting process and thereby advance his knowledge, in return for which he could invoice MAL for his efforts based on the daily rate of $75.

Opportunity for profit in the performance of tasks

[13] Unlike a fully-fledged adjuster, Buchinski was stalled at the $75 per day level unless and until he attained the skill level required by MAL to accord with industry standards. He was not able to take advantage of efficient time

management because he was required to wait for a telephone call providing him with the location where some senior adjusters were either already working or were about to attend.

[14] In the within appeals, McQueen testified that during the course of discussions held between himself and Buchinski it was understood – by both parties – that Buchinski, notwithstanding his trainee status – would be an independent contractor. McQueen stated he was certain that at some point in their conversations, Buchinski had been told he would be in business for himself. Unlike the situation in *Wray, supra,* there was no further evidence of intent – on the part of Buchinski – that he had agreed with that characterization of status for purposes of their working relationship. Buchinski applied for employment insurance benefits – perhaps, on the basis of accumulated hours during previous employment – but that conduct is not consistent with an acceptance that he was an independent contractor while providing his services to MAL during the relevant period.

[15] At this point, I am going to quote extensively from my judgment in *Wray, supra*, written more or less contemporaneously with these reasons. The jurisprudence quoted therein together with a discussion of the hail crop insurance industry and the services provided by adjusters is applicable to the within appeals. In those appeals, I concluded the worker – Skene – was an independent contractor. At paragraph 14 of *Wray* and following, I commented:

> [14] In the case of *Canadian Fitness and Lifestyle Research Institute v. M.N.R.*, [1990] T.C.J. No. 1020, Judge Mogan, T.C.C., considered the status of workers supplying services to a non-profit organization funded mainly by the federal government. The appellant in that case had engaged 82 fitness appraisers for a period of approximately two months to conduct a fitness survey of a pre-selected group of Canadians and had entered into agreements with the workers on the basis they would be independent contractors. At pp. 6 - 8 of his reasons Judge Mogan stated:
>
> > In the circumstances outlined above, I am required to decide whether the fitness appraisers were employees of the Appellant or independent contractors. In Moose Jaw Kinsmen Flying Fins Inc. v. M.N.R., 88 DTC 6099, the Federal Court of Appeal confirmed that the definitive authority on this issue is the decision of that Court in Wiebe

Door Services Ltd. v. M.N.R., 87 DTC 5025. In the Wiebe Door case, there was reference to an earlier decision in which Lord Wright had described a fourfold test comprising (1) control; (2) ownership of the tools; (3) chance of profit; and (4) risk of loss. MacGuigan J. stated at page 5029:

> ... I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, supra, calls 'the combined force of the whole scheme of operations', even while the usefulness of the four subordinate criteria is acknowledged.

When I view the Appellant's 1988 survey with emphasis on "the combined force of the whole scheme of operations", I conclude that the fitness appraisers were independent contractors and not employees. On the first two tests, I find that the Appellant owned the equipment (i.e. tools) but had virtually no control over the fitness appraisers. Because the 1988 survey was national in scope, statistical accuracy required all appraisers to use standard equipment. There were minimal instructions given to the appraisers: locate selected families and book appointments; ensure that the questionnaire is completed; perform the physical tests if, in the opinion of the appraiser, the subject was able; complete all tests within two months; and maintain information contact with the Regional Supervisor. The appraisers had very wide discretion as to how they would follow these instructions. The Regional Supervisor had no control over the appraisers but would know if certain appraisers were not performing the required tests.

On the third and fourth tests, I find that there was little chance of profit or risk of loss in an accounting sense because the fitness appraiser received a progress payment every two weeks over the two-month period of the survey and all travel expenses were reimbursed. Although a

> fitness appraiser would not earn a profit or suffer a loss in an accounting sense by taking on this engagement, there was an opportunity to consolidate appointments and, by performing two or three family surveys on selected days, a team of appraisers could free up other days when they would be paid the per diem fee of $96.15 for performing little or no work. In other words, a team of appraisers could work hard; finish early; and continue to draw the per diem fee for the balance of the two months. There is a profit incentive in this kind of arrangement which is different from the production incentive in piece work.
>
> The overall scheme of the 1988 survey permitted each fitness appraiser to retain any prior employment or business through the two-month survey period. The training period was only one week and debriefing was only one day. There were no fixed hours. Indeed, because it was a "family" survey, the evidence indicated that most surveys were in fact done in the evening or on weekends apart from the normal working hours of a five-day week.
>
> It is significant that the three fitness appraisers who testified at the hearing had all maintained their outside employment or other commercial engagements throughout the two-month period when they were doing the 1988 survey. It is also significant that the costs of the four prior qualifications were absorbed by the individual appraisers: personal liability insurance; being a CFA or RFA; having a CPR certificate; and having automobile business insurance. In an ordinary employer/employee relationship, I would expect the employer to pay for one or both kinds of insurance. In my opinion, there was no employer/employee relationship between the Appellant and the 82 fitness appraisers. The appeal is allowed.

[15] In the case of *Ariana Appraisals Inc. v. Canada (Minister of National Revenue – M.N.R)*, [1994] T.C.J. No. 303 Judge Teskey, T.C.C., held that a real estate appraiser, although

requiring periodic supervision from an accredited appraiser as part of her course of study, was an independent contractor because she worked from her home, used her own equipment, set her own hours and invoiced the company for appraisals done. In addition, she was free to work for other companies at the same time.

[16] In the Questionnaire – Exhibit A-7 – with respect to the question whether he considered himself to be an employee or self-employed while working for Agencies, Skene responded as follows:

> Self-employed – Could work hours of my choice, could work for other companies, could choose to work or take time off, supplied my own working tools.

[17] In the case of *Minister of National Revenue v. Emily Standing*, [1992] F.C.J. No. 890 Stone, J.A. stated:

> ...There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the **Wiebe Door** test ...

In *Wolf v. Canada*, 2002 DTC 6853, the Federal Court of Appeal - post-*Sagaz* – considered the income tax appeal of a mechanical engineer specializing within the aerospace industry. [18] The question arose whether that appellant was an employee of Canadair or an independent contractor. Analysis of the various factors to be taken into account in deciding this issue was based upon the relevant articles of the Civil Code of Québec in addition to the applicable jurisprudence up to and including the decision of the Supreme Court of Canada in *Sagaz, supra.* For purposes of the within appeals, the interesting aspect of the decision of the Federal Court of Appeal in *Wolf* concerns the weight to be given to the intent of the parties in determining the characterization of their working relationship. The discussion is significant in that the caveat inherent in the words of Stone, J.A. in *Standing, supra*, have served to remind parties they cannot merely affix a label to their working situation and expect it to stick unless the overall context otherwise permits. Prior to concluding that the engineer's relationship with Canadair had been that of an independent

contractor, Desjardins, J.A. - at paragraph 93 of her reasons for judgment – stated:

> Both Canadair's work and the appellant's work were integrated in the sense that they were directed to the same operation and pursued the same goal, namely the certification of the aircraft. Considering, however, the fact that the integration factor is to be considered from the perspective of the employee, it is clear that this integration was an incomplete one. The appellant was at Canadair to provide a temporary helping hand in a limited field of expertise, namely his own. In answering the question 'whose business is it?' from that angle, the appellant's business stands independently. Once Canadair's project was completed, the appellant was, so to speak, ejected from his job. He had to seek other work in the market place. He could not stay at Canadair unless another project was under way.

[19] Décary, J.A. – concurring in the result – commented at paragraph 115 of his reasons:

> As a starting point, I would like to quote the very first paragraph of an article written by Alain Gaucher (A Worker's Status as Employee or Independent Contractor, 1999 Conference Report of Proceedings of the 51st Tax Conference of the Canadian Tax Foundation, p. 33.1):
>
> > In an ever-changing Canadian economy, the legal relevance of a worker's status as independent contractor or employee continues to be important. The issues relating to employment status will only increase in importance as employers continue to move toward hiring practices that favour independent contractors and a greater number of individuals enter or re-enter the work force as independent contractors.

[20] At paragraphs 117 to 120, inclusive, Décary, J.A. continued as follows:

The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e the intention of the parties. Article 1425 of the Civil Code of Quebec establishes the principle that ' [t] he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract'. Article 1426 C.C.Q. goes on to say that ' [i] n interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account'.

We are dealing here with a type of worker who chooses to offer his services as an independent contractor rather than as an employee and with a type of enterprise that chooses to hire independent contractors rather than employees. The worker deliberately sacrifices security for freedom ('the pay was much better, the job security was not there, there were no benefits involved as an employee receives, such as medical benefits, pension, things of that nature...' Mr. Wolf's testimony, Appeal Book, vol. 2, p. 24). The hiring company deliberately uses independent contractors for a given work at a given time ('it involves better pay with less job security because consultants are used to fill in gaps when local employment or the workload is unusually high, or the company does not want to hire additional employees and then lay them off. They'll hire consultants because they can just terminate the contract at any time, and there's no liabilities involved', ibid., p. 26). The hiring company does not, in its day-to-day operations, treat its consultants the same way it treats its employees (see para. 68 of Madam Justice Desjardins's reasons). The whole working relationship begins and continues on the basis that there is no control and no subordination.

> Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. Should that not be enough, suffice it to add, in the case at bar, that the circumstances in which the contract was formed, the interpretation already given to it by the parties and usage in the aeronautic industry all lead to the conclusion that Mr. Wolf is in no position of subordination and that Canadair is in no position of control. The 'central question' was defined by Major, J. in Sagaz as being 'whether the person who has been engaged to perform the services is performing them as a person in business on his own account'. Clearly, in my view, Mr. Wolf is performing his professional services as a person in business on his own account.
>
> In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[21] In his brief judgment - also concurring in the result - Noël, J.A. considered the matter of intention of the parties and his reasons are reproduced below:

> I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their

relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

My assessment of the applicable legal tests to the facts of this case is essentially the same as that of my colleagues. I view their assessment of the control test, the integration test and the ownership of tool tests as not being conclusive either way. With respect to financial risk, I respectfully agree with my colleagues that the appellant in consideration for a higher pay gave up many of the benefits which usually accrue to an employee including job security. However, I also agree with the Tax Court Judge that the appellant was paid for hours worked regardless of the results achieved and that in that sense he bore no more risk than an ordinary employee. My assessment of the total relationship of the parties yields no clear result which is why I believe regard must be had to how the parties viewed their relationship.

This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding (Compare Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161 at 170).

[22] It is apparent a new wind is blowing through the musty repositories of traditional jurisprudence concerning the method by which to analyze circumstances relevant to the determination of working relationships. As a consequence, the former employer/employee relationship - which drew heavily upon precepts inherent in the bond between master and servant - has undergone a fresh examination in an effort to catch up to the realities of the new workplace and to recognize the fresh face of a modern workforce that has learned how to adapt to unpredictable demands for specialized services – often, in the short-term - within the new rules of engagement applicable to a highly competitive global marketplace.

[23] In the within appeals, one must bear in mind that Agencies sells insurance against damage to crops caused by hail. The hail season – thankfully – is short and during some growing seasons it may not hail much – if at all - on most of those crops that have been insured by the particular insurance company on whose behalf Agencies sells the policies. As stated by Wray in the course of his testimony, there are some areas within the Prairie Provinces where Agencies will not have sold any policies in a particular year. In addition, if it does not hail upon the crops of those farmers who have chosen to purchase insurance from the appellant, there will be no need for adjusters – like Skene – to perform any services. The business of Agencies is substantially greater and more complex than adjusting crop loss and operates year-round. As a result, the working relationship between the hail insurance industry and its adjusters, who are able to accept or reject adjusting assignments during a short summer period, is not conducive to characterization of a traditional employer/employee relationship. In the within appeals, Skene was not like a fireman at an airport who may never have to put out a fire on the runway but has to be at work each day, in uniform, ready to roll in the event of trouble. In the interim, there are a hundred things to accomplish in order to maintain that state of readiness. In contrast, Skene was not required to stand by nor was he compelled to accept any assignment should he receive a call from Agencies. If he accepted certain adjusting jobs, he could work 7 days per week including some evenings. He could choose whether to travel to other areas within Saskatchewan or to neighbouring provinces and was free to set up his own appointments with farmers. He was able to organize his own schedule to the point where he could advise the appellant he would not accept assignments during a specified period. At the beginning of the growing season, the fixed daily amount for adjusting services was established by Agencies and Skene was

> free to accept that rate or not. In 2001, the per diem remuneration had been increased to $140 from $130 the previous year.
>
> [24] I return to the issue - identified as the central question in the judgment of Major, J. in *Sagaz, supra,* - whether the person who is performing the services is doing so as an individual in business on his own account. There is very little to suggest that Skene was not ready, willing, able, and content to provide his services to the appellant on that very basis. There is no jarring incongruity within the overall circumstances of the working relationship under analysis that would cause one to question the legitimacy of that characterization by both the worker and the payor in the within appeals. Not every aspect of each commercial enterprise can be made to fit the traditional mould. In those circumstances where the usual indicia are ambiguous and do not favour a clear characterization of working status - when properly considered in a global sense - and, having regard to the context in which the services were provided, including an appreciation of any specialized aspect of the relevant activity, business or industry, then the intention of the parties - provided their subsequent conduct was consistent with their original expressed intent - should be accorded deference during any subsequent analysis of their working relationship.
>
> [25] In the within appeals, the evidence supports the proposition that there were two businesses operating, one on the part of Agencies - in a much broader sense - and the other on the part of Skene who was offering his services as a skilled crop loss adjuster knowledgeable in processing the specific documentation utilized by Agencies and the insurer as it pertained to processing a claim for crop damage (See *Precision Gutters Ltd. v. Canada (Minister of National Revenue - M.N.R.),* [2002] F.C.J. No. 771).

[16] I appreciate that wherever possible an effort should be made to issue decisions that are as consistent as humanly possible given the propensity for various fact situations some of which - like a snowflake under close scrutiny - reveal distinct and – on occasion -seemingly minor differences. There is an argument to be made that merely because Buchinski was not a full-fledged adjuster, he could still be an independent contractor providing his services to the best of his ability at that time. Merely because a trucker only has a ½ ton truck and no air-brake certification does not mean he must be an employee of the payor because he is restricted to hauling a lesser load on more or less level ground. On the other hand – and there always is at least one – it is not unreasonable to consider Buchinski in the same context as any tyro who is engaged in a program –

formal or informal – with respect to education, training, certification and/or practical acknowledgement of the attainment of a necessary level of skill sufficient to provide a service on his own account. There are several categories of tradesmen and other service providers who must undergo either formal apprenticeship and licensing procedures or pursue a combination of study and on-the-job training prior to striking out on their own. The same principle applies to most professionals who must undergo a period of practical tutelage under the supervision of senior members of their particular discipline. The reason the term "fully-fledged" – borrowed from the avian classification – is used to describe someone able to function independently is that without the proper feathers of training and experience one cannot fly solo. One may ask how any person is to acquire experience in the business of adjusting crop loss if agencies are reluctant to hire someone on the basis he or she will be an employee in the ordinary sense. Perhaps, would-be adjusters should attend appropriate conferences and seminars at their own expense, undertake a study of relevant manuals and enter into an arrangement with senior adjusters in order to obtain training within the context of a learning process commonly referred to as work experience or internship. Once qualified in the eyes of the potential payors, an adjuster can – in effect – hang out a shingle and start soliciting work from various insurance companies and/or farmers engaged in dispute resolution as referred to by McQueen in his testimony. On the evidence before me, it is difficult to conclude there were two businesses operating as I was able to do in *Wray.* During the relevant period, the worker did not possess the ability to perform at the level required of a person capable of providing adjusting services on his own account. Since these matters are decided by examining the various indicia in a global sense, the lack of proof concerning the intent of the parties played a significant role in this conclusion. It is the perspective of the worker - applying the test of reasonableness – that represents the trump card in examining this particular factor within the overall analysis required to determine working status. In *Wray,* I had the benefit of reading the answers of the worker as set forth in the Questionnaire solicited and relied on - to some extent – by the Minister. The circumstances in *Wray* permitted the conclusion to be drawn that the adjuster – Skene – had provided services on the basis he was in business on his own account because the original expressed intent was consistent with subsequent conduct of both parties throughout the working relationship and - overall – the surrounding factors either supported or – perhaps, more important - did not destroy the foundation upon which the validity of that characterization was based.

[17] In accordance with the foregoing reasons, both appeals are hereby dismissed and the decisions of the Minister issued pursuant to the *Act* and the *Plan* are confirmed.

Signed at Sidney, British Columbia, this 3rd day of July 2003.

"D.W. Rowe"

Rowe, D.J.

CITATION:	2003TCC430
COURT FILE NO.:	2002-2996(EI), 2002-2997(CPP)
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